STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 7, 2003
v	No. 227179 Oakland Circuit Court
RONALD E. GENTRY, Defendant-Appellant.	LC No. 96-144315-FC

Before: O'Connell, P.J., and White and B.B. MacKenzie*, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and conspiracy to possess with intent to deliver 225 or more but less than 650 grams of cocaine, MCL 750.157a. He was sentenced as a third habitual offender, MCL 769.11, to consecutive terms of fifteen to sixty years for each conviction. He appeals as of right, and we affirm.

I

Defendant was tried jointly with codefendant Charles E. Williams, who was convicted of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i), and conspiracy to possess with intent to deliver more than 650 grams of cocaine, MCL 750.157a.[1]

The Pontiac Police Department used a confidential informant to set up purchases of cocaine from codefendant Williams on October 11 and 12, 1995. The confidential informant contacted Williams to place his order, following which Williams proceeded from his home on 546 Nevada in Pontiac to defendant's home on 566 Pearsall in Pontiac. Williams then met the informant and delivered the cocaine. On October 13, 1995, the informant arranged to buy cocaine from Williams for a third time. Again, Williams left his home on Nevada and went to defendant's house on Pearsall. Upon leaving defendant's house, Williams was arrested in the

[1] Defendant was charged with conspiracy to deliver the greater amount as well, but was convicted of conspiracy with respect to the lesser amount. Williams' convictions were affirmed by this Court in *People v Williams*, 240 Mich App 316; 614 NW2d 647 (2000).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

driveway with twelve grams of cocaine in his possession. During a subsequent search of defendant's house, the police found 628 grams of cocaine in a locked safe that was in the laundry room at the back of the house. Some baggies were also found on or near the dryer in the laundry room. When the police arrested Williams, he had a key to the safe in his possession; police tried other keys in Williams' possession on the door to defendant's house, but none of them fit the lock. The police also executed a search warrant at Williams' house at 546 Nevada. When the police executed the warrant, three individuals were seated in the kitchen area preparing crack cocaine. The police detained the individuals and seized a measuring cup and bowl containing cocaine, and a scale, baggies and a box of baking soda. The police also confiscated a white paper bag with cocaine residue; defendant's fingerprint was on this bag. In addition, the fingerprint of one of the individuals apprehended in Williams' kitchen was found on a bag in the laundry room of defendant's house.

II

Defendant first argues that the trial court erred in denying his motion to suppress the evidence seized from his home on the basis that the affidavit in support of the search warrant contained false statements of material fact. This Court reviews the trial court's findings of fact in deciding a motion to suppress evidence for clear error. The trial court's ultimate decision regarding a motion to suppress is reviewed de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

As did the panel in *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000), we find that there is support for the defense claim that the affiant made false statements in the affidavit regarding the nature of the informant's cooperation and the informant having asserted that cocaine was being stored daily at defendant's house at 566 Pearsall. Nevertheless, as in *Williams*, we agree that suppression is not required because the allegedly false statements were not necessary to a finding of probable cause. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). Defendant's efforts to distinguish *Williams* fail. Apart from the challenged statements, ¶¶ E(1) - (6) of the affidavit sufficiently establish the requisite probable cause to believe that drugs would be found at 566 Pearsall Street. The affiant and his fellow officers observed a consistent pattern of behavior: Williams agreed to deliver drugs, went directly to defendant's house, and then directly to deliver the drugs. These observations were sufficient to support the warrant without the challenged statements.

III

Defendant next argues that he was denied the effective assistance of counsel when trial counsel stipulated to the admission of codefendant Williams' "similar acts" evidence under MRE 404(b), and further, failed to ask for a separate trial. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms; and that there is a reasonable probability that, but for

counsel's error, the result of the proceedings would have been different; and that the resulting proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant seems to be objecting that most of the similar acts evidence did not involve him, but only Williams and Kincaid, and that he therefore likely suffered prejudice through unfounded guilt through association. We disagree. To the extent that the evidence did not involve him, counsel made this clear, and we will not assume that defendant was prejudiced. To the extent that the evidence involved defendant because it included observations of Williams going to defendant's house in the same manner as was testified to with respect to the October transactions, defendant does not appear to be raising a challenge. We find no prejudice arising from the asserted errors of counsel.

In addition, counsel was not ineffective for not requesting a separate jury or separate trial. A defendant does not have an absolute right to a separate trial. MCL 768.5; *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). The decision to sever or join trials is within the trial court's discretion; severance is required under MCR 6.121(C) only when a defendant shows that his substantial rights would be prejudiced and that severance is necessary to avoid potential prejudice. *Hana*, *supra* at 331, 351-352. Prejudice may be established by showing that a defendant's defense is not merely inconsistent with a codefendant's defense, but is "mutually exclusive" or "irreconcilable." *Id*. at 349. Here, there is no indication that defendant and codefendant Williams' defenses were mutually exclusive or irreconcilable. Indeed, as plaintiff points out, counsel for codefendant, in an effort to negate the prosecution's conspiracy charge against his client, explicitly argued that defendant was not guilty. Under the circumstances, we cannot conclude that counsel acted unreasonably by failing to request a separate trial or separate jury in this case.

Defendant also claims that he was denied the effective assistance of counsel due to a conflict of interest because his attorney was representing codefendant Williams on some unrelated drug charges that were pending in another court. When alleging ineffective assistance of counsel due to a conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Here, the record reveals that counsel disclosed his representation of codefendant Williams and that defendant expressly waived any conflict of interest.

IV

Defendant next argues that the trial court erred by denying his motion for a mistrial after police officers testified that they believed defendant's home was being used as a safe house for drugs and that defendant knew about the drugs. Defendant claims that, by allowing the testimony, the trial court improperly permitted the police officers "to invade the province of the jury and answer the ultimate question of whether [he] knew drugs were being stored in his home." The denial of a motion for a mistrial is reviewed for an abuse of discretion, which "will be found only where denial of the motion deprived the defendant of a fair and impartial trial." *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990).

In *Williams*, this Court, addressing codefendant Williams' claim that the trial court improperly admitted drug profile evidence, held that the trial court erred to the extent that it permitted police witnesses to express an opinion or state a belief or conclusion that codefendant Williams used defendant's house as a safe house. *Williams*, *supra* at 321. We similarly agree that the trial court erred in permitting the police witnesses to testify that Williams used defendant's house as a safe house and in allowing one officer to state his opinion that defendant knew that drugs were being stored in the house.

Nonetheless, we conclude that the error was harmless. As this Court stated in *Williams*, *supra* at 321:

> When assessing a defendant's nonconstitutional allegation of error, the test is whether " 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26.

Although the expert testimony went too far, we think it highly unlikely that it was outcome determinative. The issue was squarely drawn for the jury - - whether there was sufficient evidence to conclude that defendant knew that Williams was storing cocaine in his laundry room, and was part of Williams' operation, or whether defendant's sister, who was Williams' girlfriend, provided the hiding place on her own. The experts properly gave testimony concerning safe houses. It is unlikely that the jury simply accepted their opinions - - that defendant provided Williams with a safe house and knew about the drugs - - because the witnesses were police officers, without separately determining whether the opinions were supported by the evidence. In other words, we think it clear that the jury understood its role as being to determine whether the conclusions of the officers were supported by the remainder of the evidence. Apart from the challenged police testimony, the evidence established that codefendant Williams went to defendant's house each time immediately before delivering cocaine to the confidential informant on October 11 and 12, 1995. He went there again on October 13, 1995, after arrangements were made for a third transaction and, upon leaving defendant's house, he had cocaine on his person when he was arrested. Defendant was at home at the time, and, although Williams had a key to the safe containing the cocaine, police did not find a key to defendant's house. Furthermore, during a search of codefendant Williams' house, three individuals were in the kitchen in the process of preparing crack cocaine, and defendant's fingerprint was on a white paper bag containing cocaine residue. In view of this record, it does not affirmatively appear that it is more probable than not that the challenged testimony was outcome determinative. Accordingly, the trial court did not err in denying defendant's motion for a mistrial on the basis of that testimony, because defendant was not denied a fair and impartial trial.

V

Defendant next challenges both the court's denial of his motion for directed verdict, and the sufficiency of the evidence that defendant knowingly possessed cocaine or was involved in a conspiracy. Viewed in a light most favorable to the prosecution, the evidence as set forth above, and the reasonable inferences drawn therefrom, were sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was guilty of both possession with intent to

deliver 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and conspiracy to possess with intent to deliver 225 or more but less than 650 grams of cocaine, MCL 750.157a. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, modified on other grounds 441 Mich 1201 (1992). The lack of "hard evidence" of defendant's involvement is not dispositive. The circumstantial evidence was sufficient.

VI

In a supplemental brief, defendant raises three additional issues, none of which have merit.

First, defendant has failed to show that counsel was ineffective for failing to call either Lottie Landrum or Jimmy Green as witnesses. It is not apparent that the failure to call these witnesses deprived defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). It is unlikely that the witnesses' testimony that defendant did not have a relationship with Williams and had nothing to do with trafficking or conspiring to sell drugs would have affected the outcome of the trial in light of Williams' consistent pattern of going to defendant's house before delivering drugs, and defendant's presence in the home. Nor was counsel ineffective in failing to secure Williams' testimony. Assuming Williams would have testified, his testimony that defendant had no knowledge of the cocaine at his home would have been seen as self-serving, and would not have increased the likelihood of an aquittal.

Second, the magistrate did not abuse his discretion in binding defendant over for trial. *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). There was sufficient evidence to support the bindover. Although defendant argues that the police testimony at the preliminary examination was not credible, the credibility of the witnesses was a question for the trier of fact to resolve at trial. *People v Northey*, 231 Mich App 568, 577; 591 NW2d 227 (1998).

Finally, in light of defendant's explicit on-the-record waiver of any conflict of interest arising from defense counsel's representation of codefendant Williams on unrelated charges, the trial court was not required to further investigate the matter.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie